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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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ALEXANDER and SUSAN PROUT,
as parents, next friends, and
legal guardians of F.P., a
minor,

Plaintiffs,

v.

ST. PAUL'S SCHOOL

Defendant.

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16-cv-225-PB
September 20, 2017
2:03 p.m.

TRANSCRIPT OF HEARING ON
MOTION TO MODIFY SCHEDULING ORDER
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Plaintiffs: Stephen G. Grygiel, Esq.
Steven J. Kelly, Esq.
Silverman, Thompson, Slutkin &
White, LLC

Charles G. Douglas III, Esq.
Douglas, Leonard & Garvey, PC

For the Defendant: Bruce W. Felmly, Esq.
Michael A. Delaney, Esq.
Jennifer L. Parent, Esq.
McLane Middleton, PA

Elyse D. Echtman, Esq.
Orrick, Herrington & Sutcliffe, LLP

Court Reporter: Liza W. Dubois, LCR, CRR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, New Hampshire 03301
(603) 225-1442

1 P R O C E E D I N G S

2 THE CLERK: Court is in session and has for
3 consideration a motion hearing in the matter of
4 Alexander and Susan Prout versus St. Paul's School,
5 civil number 16-cv-225-PB.

6 THE COURT: All right. I'll hear you on your
7 motion to modify the scheduling order.

8 MR. FELMLY: Good afternoon, may it please the
9 Court, your Honor.

10 I'm Bruce Felmly, and together with Mike
11 Delaney and Jennifer Parent from McLane Middleton, we
12 represent St. Paul's School in this matter, the
13 defendant.

14 I'd also like to introduce to the Court
15 Attorney Elyse Echtman, who's from the Orrick firm, who
16 was admitted this week pro hac vice and who we have
17 asked that firm to coordinate with us and cocounsel with
18 us in connection with both the civil case we're here on
19 as well as the criminal matters that are pending.

20 This motion was filed in August in order to
21 address, really, two realities that are facing the
22 parties and that affect the schedule. By the time we
23 filed it, it was clear that the original schedule the
24 parties had set up for discovery and for handling the
25 deadlines on the preparation for trial was not going to

1 be realistic. We had a September date for the
2 plaintiff's disclosure.

3 The parties have engaged in substantial
4 discovery, both at the interrogatory level, initial
5 disclose, and in document discovery, but I'll address
6 some of the problems and issues that went on with that,
7 and it became clear that we were not going to be on a
8 track that would lead us through the fall on the
9 schedule that had been established to a trial in March.

10 The second factor or reality that unexpectedly
11 confronted the defendant is that in July the Attorney
12 General of New Hampshire announced to the school and
13 publicly that there was underway a criminal
14 investigation related to St. Paul's School bearing on
15 several different issues, including exactly the issues
16 that are at the heart of this case, the matter involving
17 Owen Labrie and the senior salute and the issue of
18 whether there was --

19 THE COURT: Are they -- they're telling you
20 they're investigating the Owen Labrie matter?

21 MR. FELMLY: Oh, yeah; the senior salute, the
22 events of that. I don't know that they're going in and
23 saying, we're going to retry the criminal case, but the
24 issue of how it would be that the school would have that
25 circumstance developed, what is the history of the

1 senior salute, what's the level of oversight --

2 THE COURT: Did you get some kind of formal
3 notice of this investigation?

4 MR. FELMLY: We did.

5 THE COURT: Do you have a copy of whatever
6 that notice is?

7 MR. FELMLY: We do, although I'm not sure that
8 is in a position to be shared, certainly in a public
9 way, and Mr. Delaney, who's focused more on the criminal
10 investigation, but we received --

11 THE COURT: Has the plaintiff seen it?

12 MR. FELMLY: They have not seen the
13 materials that are not available publicly, no. We are
14 constrained --

15 THE COURT: Well, I'm just trying to figure
16 out -- you're representing to me that the scope of the
17 investigation that the Attorney General has notified you
18 that he is -- who is the Attorney General -- he is
19 conducting is -- encompasses the very acts that are the
20 subject of this litigation; is that --

21 MR. FELMLY: I'm representing that and I don't
22 think there's any question about that, although it goes
23 broader than that. It also includes historic issues
24 that were the product of an investigation the school
25 undertook and released information about historic

1 impropriety that involved certain faculty members.

2 There was also some incident --

3 THE COURT: I'm just a little -- I don't have
4 any reason to dispute your contention. It just seems a
5 little bit strange to me that the Attorney General
6 through his representative, the County Attorney,
7 presumably investigated the circumstances of this case
8 quite thoroughly before they indicted somebody, went to
9 trial, and obtained convictions against them.

10 So I'm just trying to understand. Did they
11 explain why they want to reinvestigate this particular
12 case?

13 MR. FELMLY: Well, not -- there are dialogues
14 and discussions going on in that criminal investigation.
15 I don't know that they gave us their entire strategy,
16 but I think that their position was they were concerned
17 to make sure there were not underlying system problems
18 or issues that go beyond a particular incident or a
19 particular assault that might affect the safety or the
20 welfare -- the way they described it was they were
21 looking at issues in terms of, you know, injuries to
22 children as well as obstruction of justice --

23 THE COURT: I know very little about anything
24 to do with this case other than what you have told me
25 about through your pleadings and in other statements,

1 but I thought there was some incident this past spring
2 or summer that triggered the investigation and I thought
3 the investigation was primarily focused on that.

4 MR. FELMLY: No. But it's part of it. Let me
5 read to you -- this is --

6 THE COURT: Am I right in assuming that that
7 at least is ostensibly what triggered this new
8 investigation?

9 MR. FELMLY: I don't know if that was the
10 straw that, you know, broke the camel's back in terms of
11 it, but I'll tell you what the Department of Justice in
12 their news release on July 13th said, and it encompasses
13 the things I've just mentioned.

14 "The investigation has been initiated as the
15 result of a 2017 report concerning sexual assaults by
16 St. Paul's teachers on their students," which is the
17 historic issue.

18 "Earlier information about student sexual
19 conquest rituals such as the 'senior salute,' a practice
20 which led to the highly publicized arrest, trial, and
21 conviction of a St. Paul's student in 2015; and
22 allegations of a similar ritual reported in June of this
23 year."

24 So that combination of events is what they
25 have told us is the reason why in July they've --

1 they've developed that. And, as you know, it was
2 publicized, there was an issue in June of certain
3 students using a fast food paper crown and allegedly
4 keeping track, according --

5 THE COURT: I don't know, frankly.

6 MR. FELMLY: Okay. Well I'll tell you that.

7 THE COURT: I don't know anything about that.

8 MR. FELMLY: There was an allegation that
9 there was some sort of action by students where they
10 were photographing people with this fast food sort of
11 Burger King crown and names of people that supposedly
12 people had dated or hooked up with or something was on
13 there. And that became a matter of school disciplinary
14 action and concern and it obviously is a matter of
15 concern to the Attorney General's Office.

16 So that is part of the mix, but the point I
17 was making to you is that a critical part of the mix is
18 the exact circumstance and issues that is involved in
19 this case and I don't think they can be, you know,
20 more clear about that; that the Owen Labrie alleged
21 assault --

22 THE COURT: So the Attorney General
23 potentially may indict additional people for the events
24 that led to the indictment of Mr. Labrie.

25 MR. FELMLY: That would be --

1 THE COURT: That's what you're telling me.

2 MR. FELMLY: I'm telling you they have said
3 this will go where it goes and that -- it's a criminal
4 investigation, so that potential, of course, exists.

5 THE COURT: Okay.

6 MR. FELMLY: And so --

7 THE COURT: But my experience with the
8 Attorney General's Office is that it doesn't just
9 conduct random investigations -- criminal
10 investigations. That's why it seems unusual to me. I'm
11 trying to understand what is going on here.

12 It's basically a historic look at everything
13 that St. Paul's has done in this area that might result
14 in criminal charges being brought against anyone for
15 anything from today going back to when the statute of
16 limitations would have run.

17 MR. FELMLY: Well, I think they've indicated
18 that they're looking at a period that goes back to 2011
19 in particular, but the issue of the report that was
20 published by the school that identified some historic
21 incidents involving faculty members goes back.

22 So we don't know, really, what the outside
23 limit of it is. I can tell you they have made a
24 document request which is extremely broad and extremely
25 persuasive and detailed. We have document IT experts

1 working on that. It will dwarf, in all likelihood, the
2 extensive ESI and documentation going on here. The
3 interviews of various parties have not occurred, but
4 there clearly is a group of officials and administrators
5 and faculties that are involved with the school, either
6 now or formerly, that in all probability are going to be
7 interviewed in part of that investigation and it will
8 clearly overlap with exactly the circumstances that the
9 plaintiffs have alleged their breach of duty regarding
10 the Prout plaintiff.

11 THE COURT: I have not received any -- any
12 requests from the Attorney General's Office that I stay
13 this case pending its investigation. Have they
14 indicated to you that that -- they want a stay of
15 what's occurring in this case?

16 MR. FELMLY: You know, Mr. Delaney had those
17 discussions and -- Mike, I don't know if I -- it's best
18 for us to have you state that so that I don't over -- I
19 don't think they've asked us to request a stay, but I
20 believe they've spoken to that issue.

21 MR. DELANEY: Good afternoon, your Honor,
22 Michael Delaney. Let me begin by acknowledging the
23 point you made.

24 I do think this is unique and certainly to the
25 extent that your observation is that it would be unique

1 for the Attorney General's Office to commence an
2 investigation broadly looking at that. I think --

3 THE COURT: Yeah, I -- I apologize for my
4 ignorance about this, but I frankly -- I make an effort
5 kind of to be uninformed about these matters.

6 MR. DELANEY: Understood.

7 THE COURT: I don't -- I don't do it the way
8 if I was a juror or something, but I really don't want
9 to get involved in reading about it and engaging with it
10 because I'd rather have you be the sources of
11 information for me about the case.

12 MR. DELANEY: Yeah.

13 THE COURT: And I don't mean to imply any
14 criticism. I'm simply -- ordinarily you would think,
15 okay, I thought there was this incident in May and I
16 thought that the investigation was about this incident
17 in May and that they might need to look back
18 historically to other matters while investigating that,
19 but your colleague has suggested to me that, no, it's,
20 indeed, a much broader, far-ranging criminal
21 investigation that encompasses all of these events, not
22 just to the extent they may inform an investigation of
23 current possible criminal conduct, but because they may
24 want to be bringing charges about past conduct,
25 including conduct associated with the Labrie case.

1 And that's -- that was new to me, so I -- it
2 may well have already been clear in what's in the media,
3 but I frankly don't think it's a good idea for me to be
4 trying to track down whatever's happening in the media
5 about a case like this. I find I do better if I just
6 focus on what the parties give me.

7 MR. DELANEY: So let me do my best to just
8 give you the status of what I can advise you --

9 THE COURT: Okay.

10 MR. DELANEY: -- with regarding the criminal
11 investigation.

12 And if I might add one prefatory comment, I
13 do have more information about the status of that
14 investigation than most of the other parties to this
15 case. And your Honor is well aware that when a criminal
16 inquiry is commenced, there are circumstances in which
17 somebody that is involved in that inquiry may not be at
18 liberty to speak publicly about exactly what's going on.
19 But let me first address the charges that you asked
20 about and then the scope of the investigation.

21 Relative to the charges, the Attorney
22 General's office identified two charges publicly in the
23 press release which in and of itself was a bit unique
24 announcing the investigation and then they added a third
25 charge, which was a catchall. And the charges that they

1 identified were endangering the welfare of children and
2 obstruction of government administration. And the
3 catchall was essentially any other charges that the
4 investigation might bring forward that would be
5 appropriate to be considered.

6 So those are the charges that they are
7 evaluating in connection with the commencement of a
8 parallel criminal investigation.

9 Relative to the scope, they have identified
10 three areas of inquiry in connection with those charges.
11 Two of them fall under the umbrella of the senior
12 salute. And this is in the press release that Attorney
13 Felmly just identified. One is they have identified the
14 senior salute in the context of the Labrie criminal
15 trial in the public press release.

16 So we have reason to believe, based on the
17 press release standing alone, that the scope of the
18 review of the senior salute encompasses the criminal
19 trial which obviously forms a basis of the current
20 allegations by the plaintiffs.

21 THE COURT: And does the document request
22 you've received seek documents that pertain to the
23 Labrie matter?

24 MR. DELANEY: I'm struggling with how much
25 information I can share with the Court in that regard.

1 Let me -- let me try to answer your question as follows:

2 I can tell you that the scope of the materials
3 that are under review in connection with the criminal
4 case is not any different than this case relative to the
5 senior salute and we've identified a time period at
6 least for initial purposes back to 2001 -- '11. Excuse
7 me.

8 So we have requests broadly targeted to areas
9 of inquiry that the Attorney General is looking at that
10 goes all the way back to 2011.

11 THE COURT: But do they -- and I want to be
12 clear. I'm not asking to disclose anything that you
13 feel that there's some --

14 MR. DELANEY: Understood.

15 THE COURT: -- privilege or other reason not
16 to disclose. I will say, though, it's not apparent to
17 me what the privilege is. You don't have a privilege
18 relationship with the Attorney General's Office. If
19 they send you a document request, I don't see why you
20 couldn't tell me whether the scope of it encompasses the
21 Labrie matter or not, but --

22 MR. DELANEY: Your Honor, my concern is
23 confidential proceedings that I would have obligations
24 at law not to comment on publicly.

25 THE COURT: You mean grand jury proceedings?

1 All right. So this isn't a document request;
2 this is a grand jury subpoena you're talking -- I --
3 see, I -- when you use euphemisms, I can't --

4 MR. DELANEY: Yes.

5 THE COURT: -- really know what you're talking
6 about.

7 MR. DELANEY: Yes, your Honor. We're dealing
8 with grand jury proceedings.

9 THE COURT: So you're concerned there may be
10 some state obligation -- state law obligation on your
11 part not to disclose the context of a grand jury
12 subpoena.

13 I don't know that to be true. There are
14 clearly obligations of confidentiality that the Attorney
15 General's Office has with respect to grand jury matters,
16 but I'm not aware that the recipient of a grand jury
17 subpoena under state law is barred from discussing it
18 with a judge in a pending civil case.

19 You think there's some statutory bar on that?

20 MR. DELANEY: And to assist your Honor with
21 the information that you need, I would offer that the
22 scope of the information at issue in connection with
23 pending subpoenas overlaps substantially with the
24 discovery material that would have a bearing on the
25 civil case. It goes back to 2011 and it would address

1 the issues at issue in this case.

2 THE COURT: I'm trying to proceed cautiously
3 here, given your evident caution in how you're
4 addressing me about this matter, but from my
5 perspective, you both need to understand my view.

6 I have worked as a practitioner in matters of
7 very high public attention in which there are pending
8 criminal and congressional investigations. I was deputy
9 chief counsel of the Iran-Contra committee. We had a
10 pending independent counsel investigation of the same
11 people that we were investigating for Congress.

12 As a judge, I've presided over very complex
13 litigation involving parallel criminal and civil
14 investigations. There was a case involving the TYCO
15 Corporation and a defendant named Dennis Kozlowski you
16 may have heard of. In that case, there were a
17 pending -- pending criminal investigation and criminal
18 charges involving one of the principals in the civil
19 litigation I had, Dennis Kozlowski.

20 In that case I declined to stay the litigation
21 simply because of the pendency of the case and my basic
22 view, frankly, is that blanket stays are not ordinarily
23 necessary to satisfy the needs that you have. Rather,
24 the way to address it is to deal with it in a
25 cooperative way with plaintiffs' counsel and with the

1 government to recognize that there may be additional
2 burdens that are imposed on someone that is the subject
3 of parallel pending criminal and civil investigations;
4 to recognize that people may have Fifth Amendment
5 privileges that they may assert in one context or
6 another; to recognize that there are additional
7 discovery burdens that are imposed while there are these
8 pending investigations that may require some cooperation
9 and some tailoring of deadlines, but that a blanket stay
10 is not ordinarily warranted and an investigation like
11 this can go on for many years.

12 And so absent some -- and I would say in the
13 Kozlowski case, I received a request from the district
14 attorney that I stay the litigation. And even though
15 the district attorney requested I stay the litigation, I
16 refused to do so.

17 So that's why I'm asking these questions.

18 MR. DELANEY: Yes.

19 THE COURT: I want to understand as best I can
20 what exactly your problem is to determine whether I
21 should deviate from my ordinary practice, which would be
22 not to grant a stay, but instead to find out from you
23 what specifically we can do by way of agreement --

24 MR. DELANEY: Agreed.

25 THE COURT: -- to get -- keep this case

1 moving.

2 MR. DELANEY: And so we agree with you, your
3 Honor, and we have not submitted a pleading in this case
4 that is requesting a blanket stay in connection with the
5 discovery. I think a fair reading of the pleadings of
6 both sides that have been submitted for your Honor's
7 consideration is that we come to you with a general
8 agreement that the parties recognize that there need to
9 be some scheduling modifications in this case based on
10 particular developments in the case itself and from the
11 school's perspective in part based on the commencement
12 of the parallel proceedings.

13 THE COURT: And you're saying that's all you
14 want and these unreasonable plaintiffs won't meet you
15 halfway.

16 MR. DELANEY: So what we're looking to do is
17 essentially structure the scheduling going forward that
18 does not stay the civil discovery by any means, but
19 simply structures the order of depositions from this
20 point forward which takes into consideration just the
21 reality that we've had a unique development, that that
22 is going to impact the school and administrators --

23 THE COURT: But just to -- but you've tried to
24 talk this out with -- you know that if you both came
25 forward and said, we'd like to do the following things

1 to modify the schedule, the chances are probably 99.9
2 percent that I would simply agree. And that you haven't
3 done that suggests to me that there's some disagreement
4 that you have not yet been able to resolve --

5 MR. DELANEY: The --

6 THE COURT: -- about how quickly or slowly
7 discovery will proceed in the case.

8 MR. DELANEY: And I think the core of the
9 disagreement, your Honor, would be our request to
10 structure the deposition schedule going forward so that
11 some of the core trustees, core administrators, core
12 faculty, current and former, that we anticipate will be
13 the focus of potential inquiries from the Attorney
14 General relative to its investigation; not in any way to
15 halt those depositions, but just in recognition of where
16 we're at in the developments. Structure the discovery
17 going forward so that we begin with the depositions that
18 both sides are asking for or want and simply reschedule
19 some of the depositions that were scheduled this summer
20 for some of the core administrators --

21 THE COURT: I -- I guess I'm confused and
22 maybe what I'll do is let Mr. Felmly finish anything he
23 wanted to say, but I want to turn to the plaintiffs and
24 say, what do you understand they're asking you for that
25 you're not willing to give them and why aren't you

1 willing to give them what they're asking for because,
2 again, this seems to me something reasonable people
3 should be working out without the intervention of the
4 judge. It's got a problem, I'd like to move this three
5 weeks, I'd like to make sure this person doesn't have to
6 be testifying in two places at once, this person may
7 have a Fifth Amendment issue we need to work -- let's
8 postpone that person's issue to the end.

9 These are things that -- I mean, I'm sure you
10 all as lawyers have had these kinds of experiences and I
11 think you should be able to work them out.

12 Say whatever else you want to say, Mr. Felmly,
13 and then I'll hear from plaintiffs because I'm going to
14 be trying to focus now in on specifically what's the
15 problem here; why aren't you willing to agree to some
16 reasonable extensions of some of these deadlines as long
17 as we keep the case basically on track.

18 I mean, I frankly am a little disappointed we
19 haven't gotten much further in the case than we have by
20 now and I'm -- I would like to see things accelerated
21 rather than slow it down, but it may be necessary to
22 slow down some of the depositions, for example, and I --
23 I'm willing to hear you on that, but my first instinct
24 is why haven't you agreed on these things.

25 MR. FELMLY: Well, we've had a number of

1 meet-and-confers on this issue and we're here because we
2 haven't completely agreed. But let me just tell you
3 three or four things that go to the heart of what our
4 request is.

5 First, we're not here, as Mike said -- we're
6 not here asking for a complete stay. There are probably
7 six to eight witnesses that are in the administration,
8 faculty, related to the school which will be the people
9 most involved in preparing to deal with the
10 investigation of the Attorney General's Office. And as
11 to that group of people, which the plaintiffs want to be
12 their early witnesses, we are saying we should get other
13 discovery done, let this situation begin to sort itself
14 out, revisit it with the Court.

15 We suggested that we do a tremendous amount of
16 discovery this fall. There are probably in excess --

17 THE COURT: Are you asking for any delays in
18 anything other than deposition discovery?

19 MR. FELMLY: No.

20 THE COURT: Okay.

21 MR. FELMLY: No. We -- but let me --

22 THE COURT: All of the document discovery and
23 interrogatories can proceed as scheduled; we don't need
24 to change any deadlines --

25 MR. FELMLY: Don't need to change it. And

1 just so you know, so that we're not here suggesting that
2 somehow the school is dragging its feet on that, we --
3 we received last week the plaintiffs' ESI information
4 after a series of rolling indications that it would be
5 coming along this summer. And we are now in -- the
6 recipient of, you know, thousands of pages of material;
7 we've got teams of people going through that. We
8 delivered our ESI information primarily on July 7th and
9 have supplemented it.

10 We have indicated that there are approximately
11 20 deponents. Many of them are students, people that
12 were involved in the incident, members of the Prout
13 family. None of those witnesses have any particular
14 difficulty or pose any particular conflict or challenge
15 with the criminal investigation.

16 Many of these students are in universities,
17 having graduated, across the country. They will
18 probably have their own counsel. We will -- if we
19 wanted to depose 20 or 25 of these people in the fall of
20 19 -- of 2017, we have got our hands full in terms of
21 doing it. To review these documents, do those
22 depositions, we are completely favorable and have
23 suggested to the plaintiffs we can do that.

24 And there are a number of other people. There
25 are some -- there are some school employees that are

1 not, we think, you know, in the same situation where
2 they would be diverted from their efforts in cooperating
3 with the AG's investigation. So we're not dragging our
4 feet.

5 We first sent out subpoenas for a member of
6 the Prout family initially in November as a draft
7 subpoena for Lucy Prout, the sister. We went through
8 the entire spring seeking with the counsel that the
9 family hired for her to get her deposed. The plaintiffs
10 say in their papers, not one deposition has been taken.
11 And the reason for it is Lucy was sent to Europe for
12 several months. We were just about to get Lucy's
13 deposition done, she's a key witness, she was involved
14 with her sister in connection with the Labrie matter,
15 and then the criminal investigation come in.

16 We could tee up Lucy Prout's deposition, you
17 know --

18 THE COURT: Well, both sides should be able to
19 take the depositions of people they want, not just you
20 taking their --

21 MR. FELMLY: No, no, I --

22 THE COURT: -- people's depositions.

23 MR. FELMLY: -- understand that, and that's
24 what I'm saying; there are witnesses they can take
25 that --

1 THE COURT: All right. So then let's try to
2 get -- you want to get specific before I talk to the
3 plaintiff? I'll give you that chance.

4 MR. FELMLY: No. The only thing --

5 THE COURT: Specifically whose deposition are
6 you looking to put off and how long are you looking to
7 put it off for?

8 MR. FELMLY: Yeah. I think that what -- well,
9 here's what we suggest. Let's do the witnesses that
10 don't pose this problem and then report back to the
11 Court, say, in two months, in early December, and say,
12 where do we stand on the criminal investigation; how
13 does it bear on the officials, the six or eight people
14 that are involved; and how much further delay, if any,
15 is needed on them.

16 There will be no loss in efficiency or
17 progress --

18 THE COURT: But who are we proposing to put
19 off that they want?

20 MR. FELMLY: There are -- there are -- I can
21 give you the names. If you need them in open court, I
22 can do that. They have -- they've asked for the rector;
23 they've asked for some former trustees; they've asked
24 for the dean of students; they've asked for the vice
25 rector for residential life. These are all people that

1 would be involved in the day-to-day operations --

2 THE COURT: They also sound like people who
3 it's entirely rational to believe would be deposed at
4 the end of the process rather than the beginning.

5 MR. FELMLY: It would -- that -- that would be
6 their call. They were seeking to do it at the front end
7 and I don't believe there would be any prejudice doing
8 it at the back end. I mean, I've got the listing on two
9 pages here of name by name by name of people we could
10 produce.

11 But there are also employees of the school
12 that we believe we could produce. The person that's the
13 head of the security department --

14 THE COURT: You mean you have names of lots of
15 people that they told you they want to depose that
16 you're willing to produce.

17 MR. FELMLY: A number of them. But as I'm --
18 I'm not mincing words. There are that group that we
19 think should be at the back end of this discovery.

20 We're not going to have that process done for
21 a March trial. We're not -- the school has no interest
22 in delaying this just for delay's sake. It is a
23 question of how to integrate it and combine it with the
24 efforts with the --

25 THE COURT: I --

1 MR. FELMLY: -- criminal investigation.

2 THE COURT: I need to deal with some
3 specificity here. What I -- to the extent that I've
4 been able to get it from you, what I understand you to
5 say is we've got a lot of depositions of people we want
6 to take and we'd like to move ahead and take those.

7 They have a lot of depositions that they want
8 to take. Many of the people they want to depose we
9 think can be deposed right away. And all we're asking
10 you, Judge, is let's focus on the people that can be
11 easily deposed on either side that do not raise these
12 concerns that we have because of the parallel criminal
13 investigation and let's wait on those a little bit and
14 see what happens with this criminal investigation.

15 At some point you're going to get to a point
16 where a year goes by and the criminal investigation is
17 still pending and I'm going to say to you, I don't care,
18 they need to be deposed because I'm not going to wait
19 until an open-ended criminal investigation has ended to
20 resolve my case.

21 MR. FELMLY: I understand.

22 THE COURT: But I'm initially -- my initial
23 reaction is if there are people that they can and
24 logically should depose as preliminary matters, let's
25 focus on those first and then let's come back in 90 days

1 and see where you are. Maybe we can -- have to schedule
2 those other ones up and maybe we can continue them for
3 another 90 days. I'm not going to let the case go for
4 three years with people undeposed and because there's
5 still a pending criminal investigation, we can't
6 complete the case. That's not going to happen.

7 But some modest extensions while crucial parts
8 of the case are addressed, I don't see why we couldn't
9 do something --

10 MR. FELMLY: That is exactly what we're asking
11 for. We --

12 THE COURT: Okay. I just find your request so
13 indefinitely stated that I have trouble managing --

14 MR. FELMLY: I apologize.

15 THE COURT: -- it.

16 MR. FELMLY: I apologize.

17 But I -- I'm trying to make it clear. I think
18 there are 20 some-odd depositions that the parties can
19 jointly get done, you know, in the next several months.
20 We can report back, we will then know more and whether
21 we'll need another 90 days, but I'm not contemplating to
22 stand in front of you and say, "How's never; is never
23 good for you, your Honor?"

24 That's not what we're looking for.

25 The school wants this case resolved. We've

1 worked hard to try to resolve it. But I think a staged
2 approach and a second look in 90 days or so makes good
3 sense.

4 And we understand, you know, where you're
5 coming from on that and haven't asked for anything in
6 terms of a stay.

7 THE COURT: Okay. Let me hear from the
8 plaintiffs on this.

9 So you understand my general view. My
10 general view is the pendency of the parallel criminal
11 investigation is not by itself a sufficient basis for a
12 blanket stay, but it may require some cooperation with
13 regard to the scheduling of a certain small number of
14 sensitive depositions.

15 It shouldn't ordinarily delay document
16 discovery. Apparently the plaintiffs are
17 not -- excuse me -- the defendant is not arguing that it
18 should delay document discovery. The defendant is not
19 arguing that it should delay most of the depositions
20 that the parties want to take. The defendant is merely
21 asking that we put off till further on in the process
22 the taking of certain core number of depositions.

23 That doesn't strike me as an egregiously
24 unreasonable request. Why aren't you prepared to agree
25 to something like that?

1 MR. GRYGIEL: The answer, your Honor, is
2 simple and I'm glad you asked the question.

3 Because while they are prepared and we
4 acknowledge to go forward with some discovery, the paper
5 discovery is largely done. We have exchanged
6 interrogatories. We've exchanged document requests.
7 Our document production -- production as of last evening
8 is 90 percent done. They already have our expert
9 witness materials on damages. We received I think
10 13,000 pages, which Mr. Felmly called the supplement,
11 last night to their original production of about 2,000
12 pages. That's all really done.

13 So when you step back and look at the
14 operative reality here, what we are looking at is the
15 functional equivalent of a stay whereby the defendants
16 depose all of the key witnesses on our side of the case
17 at their discretion over a period of the next couple of
18 months while some of the key witnesses --

19 THE COURT: All right. Let me interrupt you.
20 This is where I'm having trouble. Okay?

21 So, granted, I haven't been -- I've been out
22 of your business for a long time. I've been on the
23 bench 25 years now so my -- my knowledge and background
24 is dated, I will confess.

25 But it is a standard way to operate a case

1 like this to proceed inward and move outward, to proceed
2 at the bottom and move up. And it would seem to me that
3 there would be a number of people whose depositions you
4 would need to take who would be more intimately involved
5 with the particular incidents that gave rise to your
6 client's claim for liability and ordinarily would not
7 want to be deposing trustees and people like that until
8 you have already done that groundwork.

9 I think they're suggesting let's do that
10 groundwork because those people are not problems for us
11 and let's get that out of the way and then let's come
12 back in 90 days and see where we are.

13 MR. GRYGIEL: Your Honor made the point of
14 inspecificity. That's a point I share. For example,
15 two of those core witnesses who are directly involved at
16 the issues -- in the liability issues central to this
17 case are Jada Hebra and Chad Green and Bob Rettew, a
18 former employee now in Pittsburgh. They say they're off
19 limits.

20 We said, well, we'd like to also depose some
21 of these other witnesses who are no longer at the
22 school: Andrew Thompson, a former student; two other
23 students whose names have been used in initials for
24 purposes of confidentiality, HH, former student, GH,
25 former student; and potentially the Concord Police

1 Department. The defendants say, no, you shouldn't get
2 to depose those people either.

3 Then there are current employees, some of
4 whom, for example, the security director, was on their
5 list of people we could not depose, Mr. Pangakis; they
6 said, no, you can't depose him.

7 And not just, your Honor, a question of
8 structuring the timing of the depositions; it's -- their
9 stay is indefinite. What they basically do is come in
10 with zero specificity, which is required to get what is,
11 in effect, a stay, a heavy burden, a clear case of
12 hardship, according to the case law. Heck, President
13 Clinton was a sitting president and he got deposed.

14 What they come in and say to the Court is
15 probably, maybe, likely these people will be centrally
16 involved. It's abundantly clear from all the cases
17 cited in the briefing you've got to come in with a
18 specific showing that this person can't be deposed
19 because he has these administrative burdens.

20 THE COURT: Are you -- again, this is --
21 I've -- this strikes me as a case of people that are not
22 willing to listen to each other and be reasonable.

23 Are you willing to start focusing your
24 depositions on some of the people who are most
25 specifically involved at this -- with this series of

1 events at the lower levels and postpone your depositions
2 of some of the leading current administrators and
3 trustees that are involved in the ongoing investigation.

4 MR. GRYGIEL: There's a little bit of a
5 disconnect here, your Honor, and I'd like to say first
6 this isn't a case, I think, where we can't talk to each
7 other. Mr. Felmly and I, for example, I think get along
8 quite well. We have a lot of friends in common and
9 generally we have very cordial, working-together
10 relationships.

11 The problem is the investigation of the
12 incident at issue. Frankly, the criminal trial has
13 elucidated the vast majority of the operative facts
14 there. We've all heard what that's about.

15 A great deal of our case, as one looks at the
16 five counts we've pled, deals with what was going on at
17 the school. And that means getting a picture, getting
18 firsthand testimony, from people who set policy, people
19 who were involved in implementing that policy, and some
20 of those are higher-up people. It's not the usual kind
21 of tort case where you do exactly as your Honor
22 suggested, start small and build up. It's a little bit
23 different than that.

24 Another reason that I think we're here today
25 is because when I got the defendant's papers -- and I've

1 read them now three times over. I can't understand
2 where they have begun to address, let alone satisfy the
3 burden -- and it's a heavy burden -- that they have to
4 say an indefinite stay is warranted. Supreme Court said
5 in Landis that doesn't work.

6 THE COURT: Let's be -- so let's rule certain
7 things out. There won't be an indefinite stay. Not
8 going to happen, not under consideration, they say
9 they're not proposing it. I agree with you that
10 sometimes things that are not styled a stay can be the
11 functional equivalent of a stay.

12 MR. GRYGIEL: Right.

13 THE COURT: So you can't -- we can't complete
14 the case for an indefinite period of time is effectively
15 a stay, but that's not going to happen.

16 What is going to happen is an incremental,
17 continuous discovery process that might have
18 requirements for some delay of a few weeks or maybe a
19 couple of months during key parts of certain people's
20 involvement with the ongoing criminal investigation.

21 So what I'm telling you both, I hope you can
22 hear me, if you force me to do it, I will work with you
23 on individual by individual and I will set your
24 discovery schedule and I can say, take him next, take
25 him, put that person off for another 30 days and I'll

1 talk to you about it later.

2 If you force me to do that, I'll do that, but
3 I don't want to do that and I don't think you want me to
4 do that. What would be much better is if you would
5 listen to me when I provide you with general guidance
6 and understand that if you force me to make a decision,
7 I will act consistent with that general guidance.

8 And the general guidance I am giving you is
9 depositions should continue. They should continue not
10 just of people that the defendant wants to depose, but
11 people that the plaintiff wants to depose. They should
12 continue at an ordinary and reasonable and with
13 deliberate speed and there may be a need to defer a few
14 depositions, not broadly speaking all of the people you
15 want, but perhaps several of the key people for a few
16 months till we see what happens.

17 If in December there's been silence from the
18 Attorney General's Office and nothing has happened and
19 we have no indication as to when this is ever going to
20 end and you've now deposed all the people that you can
21 -- we can agree on could be done in a preliminary way,
22 then you can take those people.

23 Now, you -- you can talk about case law all
24 you want, but I have vast discretion to control the
25 processing of a case in front of me. And I hope you

1 understand that. And I certainly have the power, if I
2 determine it makes for sense to do it that way, to say
3 that is how we're going to proceed.

4 So that is my general guidance to you. With
5 that general guidance, can we identify some people that
6 you want to depose right away that you don't think
7 have -- and you've identified certain people that I'm
8 going to ask Mr. Felmly about.

9 I don't understand why you can't depose a
10 former student right away if you want to depose a former
11 student. I can't understand why you wouldn't want to --
12 you couldn't depose a former employee to the extent you
13 want to depose a former employee. I can understand why
14 the rector might not be the person that ought to be
15 deposed first while this thing is going on. I -- I can
16 understand that. So that's some very general guidance.

17 Now, with that, can you identify a plan that
18 you would propose that I can get Mr. Felmly's reaction
19 to and then if we can -- if we can't agree, I'll just
20 say, do this, do this, don't do that, and come back and
21 see me in 90 days.

22 If that's the position you want to put me in,
23 I'll do it, but I don't normally like to control the way
24 lawyers behave with that degree of precision. I usually
25 trust lawyers to behave professionally and I try to stay

1 out of their way because I don't find most lawyers like
2 judges involving themselves in the details of their
3 case. But if you require me to become involved, I
4 guarantee you, I will. So --

5 MR. GRYGIEL: I came prepared, your Honor, to
6 answer that question.

7 THE COURT: Okay.

8 MR. GRYGIEL: Yes, we would like to start with
9 former employees, people who wouldn't be burdened by the
10 only argument they made in their papers that we have to
11 do all this work for the Attorney General's
12 investigation.

13 That's Jada Hebra, Bob Rettew, James
14 Waterbury, a former trustee, and Chad Green. They're
15 all former employees.

16 THE COURT: Let's start with those.

17 Mr. Felmly, your reaction?

18 MR. FELMLY: Well, as to Rettew, I don't think
19 there's a problem. I think we can proceed with him as
20 an employee. The others are either at the vice rector
21 or dean level, right in the center of this matter.

22 THE COURT: But they're no longer employed.
23 These are former employees.

24 MR. FELMLY: No, but they were -- you know,
25 they left -- Jada Hebra left within approximately a year

1 and was involved during the exact pendency. These are
2 not people that are remote from these circumstances
3 and --

4 THE COURT: I don't understand why you're
5 concerned. They're not your employees. They're not
6 working with you on the -- building your response to the
7 criminal investigation. I can understand why you
8 wouldn't want people to know what they have to say, but
9 that isn't a legitimate ground to deny their deposition.

10 Help me, as to these people who are no longer
11 employed by you, why -- why should we defer their
12 depositions?

13 MR. FELMLY: Because they are people that are
14 involved in the scope of the investigation right in the
15 time frame that's critical to it. They were the
16 officials involved. It is not fair to say that they're
17 not cooperating or in communication with the school in
18 terms of that process. In some cases, they have their
19 own counsel, which will be complicating --

20 THE COURT: Believe me, if somebody asserts a
21 Fifth Amendment privilege or their attorney presents
22 some reason particular to them why they need some
23 additional time, I think -- I would view that as an
24 entirely distinct matter that I would be inclined to
25 grant some deference to.

1 So I understand that. If they have their own
2 counsel and their own counsel has concerns and they need
3 to get the Court involved in evaluating those concerns,
4 I --

5 MR. FELMLY: So Chad Green has his own
6 counsel. Jada Hebra was, you know, the vice rector for
7 student life during the period of time of the senior
8 salute, right in the center of that matter. Green was
9 the head of students. Waterbury was key on the board of
10 trustees at that time. I agree Rettew isn't there.
11 And, frankly, these are the people that are exactly the
12 type of individuals that would be in our group.

13 I mean, I think we're really talking about --
14 and it may be -- Waterbury was new to me. I don't
15 remember them even hearing indicate they wanted him.
16 But we're talking about six people. I mean, we're
17 essentially saying -- when you say be specific, you
18 know, there are six individuals we believe -- Waterbury
19 was new to us this afternoon -- that are in this group.

20 By contrast, the plaintiffs have indicated
21 that there are probably 10 or 15 students they're
22 interested in, so they have a joint interest. And the
23 plan that you enunciated, which was that we're going to
24 take a very small group of people that are going to be
25 in the core of it, multiple of those people have their

1 own counsel, and I don't control that. And we're going
2 to go charging off and having depositions of them with
3 their own counsel getting involved.

4 I mean, the idea of having us come back in
5 December --

6 THE COURT: Help me understand what the fact
7 that there is a pending criminal investigation does to
8 the analysis of this particular issue with respect to
9 former employees. I -- I understand, at least have some
10 understanding and sympathy to the argument that we're
11 trying to run an organization here and we're trying to
12 run an organization that is requiring -- we're required
13 to do many things at once. And I don't want my
14 principal managers distracted unnecessarily until later
15 in the process. I got that. That one registered with
16 me.

17 But that you have a former vice rector who is
18 very knowledgeable about these incidents, just because
19 she's very knowledgeable about these incidents isn't a
20 basis not to take her deposition. I think there are
21 good tactical reasons why the plaintiffs' lawyer might
22 want to proceed in a different order from what they want
23 to do, but that's their choice.

24 I'm just asking you. That she may have to
25 give testimony to a grand jury at some point, that she

1 may have to sit down and be interviewed by police
2 officers, I'm not sure why that should require any kind
3 of indefinite stay of her deposition.

4 MR. FELMLY: Well, I'm not asking for an
5 indefinite stay. I mean, I --

6 THE COURT: How long do you want to stay it
7 for?

8 MR. FELMLY: Well, as I said to you, I think
9 we should stay it just as you articulated it, for the 90
10 days or so until we get and make progress -- we've got
11 more than enough to do. There's going to be --

12 THE COURT: Okay.

13 MR. FELMLY: -- no harm and no foul.

14 THE COURT: So your request is evolving or I'm
15 understanding differently.

16 So now what you're saying is you only want to
17 put them off for 90 days --

18 MR. FELMLY: And then revisit --

19 THE COURT: -- revisit --

20 MR. FELMLY: -- with you and decide whether or
21 not it's now time to deal with it and whether I can make
22 the case and make that burden or whether we say, look,
23 there's a key point coming up.

24 I don't know what's going to be coming along.
25 I will not be representing some of those people

1 individually. I don't know what position they'll take
2 when they're noticed for their deposition and a subpoena
3 is issued. I don't want to get into collateral
4 proceedings over motions to limit, quash, postpone,
5 whatever. It's unnecessary, because there's more than
6 enough work.

7 They just got us our documents, you know, last
8 week and we've given --

9 THE COURT: You apparently just got them their
10 documents last week.

11 MR. FELMLY: Well, no, in fairness, your
12 Honor --

13 THE COURT: This sort of "he's worse than me,
14 Judge," I'm really not interested. I --

15 MR. FELMLY: Well --

16 THE COURT: -- could care less, frankly.

17 MR. FELMLY: All right.

18 THE COURT: So let's focus on the problem at
19 hand. All right?

20 The problem at hand is we've got to get this
21 case moving. Okay? So I've asked -- I am somewhat
22 sympathetic to your point that as to a former employee,
23 merely because they are knowledgeable shouldn't be a
24 basis to prevent their deposition.

25 I'm also sympathetic to his point. There are

1 a number of witnesses who nobody is going to really
2 object to. They've got to be deposed. You want to
3 depose them. Let's start with the ones that there isn't
4 an objection to and just move -- move ahead. What is
5 the big problem for you in going that way?

6 MR. GRYGIEL: The problem with that, your
7 Honor, for me is threefold, if I may be blunt.

8 THE COURT: Okay.

9 MR. GRYGIEL: And first is they have to make
10 out a case for this other than I don't want to do it and
11 they haven't done it under the law. I understand your
12 Honor has vast discretion here, but leaving that aside
13 --

14 THE COURT: I pretty much do -- can do what I
15 think is in the best interest of trying to manage the
16 case.

17 MR. GRYGIEL: I understand that, your Honor,
18 and I completely, of course, welcome that. The second
19 point -- the second point --

20 THE COURT: And I don't mean that I'm going
21 to be arbitrary about it, but I don't believe that
22 there's some kind of good cause shown standard or some
23 kind of -- that -- where I have to defer to your
24 judgment as to how to proceed.

25 I -- I have to decide how to manage the case.

1 Normally I defer to the -- your joint efforts to manage
2 the case, but if you're not able to work together, I'll
3 manage it for you. Okay? So -- and I'm going to do
4 what I think is best for managing it for me.

5 So I get your point. I put the question to
6 him. I admit I didn't get a very satisfactory answer as
7 to a former employee. So I understand that. But I'm
8 asking you a different question. Why can't we proceed
9 with those other -- with those other people, not just
10 because I get to do what I want, you can't make me do it
11 differently. I don't want to hear that approach from
12 you. I want to hear why can't you do what I'm
13 suggesting, which is depose some of these people for
14 whom there's no objection.

15 MR. GRYGIEL: And the second answer, your
16 Honor -- I hope it's a better one -- is that some of
17 these depositions that we want to take earlier that
18 might in another case be taken later will moot, we
19 think, some of these less important depositions, for
20 example, of the Slaymakers.

21 And in structuring our discovery -- and,
22 frankly, I'm a plaintiff's lawyer. I'm not interested
23 in taking depositions that aren't going to help me or
24 that cost me a lot of money to travel across the country
25 to find out stuff I already know.

1 So part of it is that some of these other
2 depositions are lower on my list and may end up
3 disappearing. We're each entitled to 30 and if I got
4 what, frankly, I needed from the first 15 I took, I
5 probably wouldn't take those other 15 and take my risks
6 if they showed up at trial.

7 THE COURT: Okay. That's a sensible argument.

8 MR. GRYGIEL: And I think that's a -- frankly,
9 a very compelling argument on our side for why we should
10 be able to proceed in the way that I'm hoping I can
11 convince your Honor we should be able to proceed.

12 I've got some other suggestions of names.

13 THE COURT: Okay.

14 MR. GRYGIEL: And they are lower-level
15 employees.

16 Victoria Ryder; the security chief whom
17 Mr. Felmly said today was okay to depose, so that's not
18 an issue anymore, George Pangakis; Theresa Ferns, she's
19 in the counseling center at the school, the Clark House;
20 and Colin Callahan. And those are all people we would
21 also like to depose in these earlier days.

22 THE COURT: Okay. Your response to those,
23 Mr. Felmly?

24 MR. FELMLY: Yeah. Theresa Ferns is the only
25 person on that list that would be in our group of six.

1 The other three -- Ryder, the security chief, and Colin
2 Callahan, you know, I think we can make that work.

3 THE COURT: Okay. All right.

4 MR. GRYGIEL: We've got some others, your
5 Honor --

6 THE COURT: Okay.

7 MR. GRYGIEL: -- since we do want to progress
8 this case and I know Mr. Felmly does, too. We talked
9 about this.

10 School witnesses who are former students, for
11 example, the Slaymakers. They don't seem to be --
12 that's the group of students that were involved in some
13 of the activities. They're lower on the list for us.
14 We -- I'm sure we can work out scheduling those. I
15 don't think there's any objection to that.

16 Lucy Hodder is a former trustee. Former
17 trustee. We would like to have her in these earlier
18 days.

19 And two other students by name; I think this
20 is appropriate, since I think they're both past the age
21 of minority now, Gus Hirschfeld and Hannah Hirschfeld.
22 They were students at the school and they are the
23 children of the rector.

24 And those are other witnesses that we think we
25 should be able to structure our depositions in a way

1 that makes sense for our case, both for efficiency and
2 for, we hope, getting our burden of proof shouldered
3 earlier on rather than later on.

4 And we also think, your Honor, to be blunt, to
5 bring up a point Mr. Felmly made earlier when he said we
6 tried to resolve the case, I think some of these
7 depositions early might help prosper an extrajudicial
8 resolution. I might be wrong about that, but they may.
9 Maybe I'm wrong about what I think about the case and
10 Mr. Felmly's right or vice versa. Some of these
11 depositions may help us with that earlier on and save us
12 all a lot of time and work.

13 THE COURT: Okay. Are you willing to put off
14 the depositions of the rector and the current trustees
15 for 90 days while we do some of these other matters and
16 then revisit the issue after 90 days?

17 MR. GRYGIEL: Yes, your Honor.

18 THE COURT: Okay. So, Mr. Felmly, what I'm
19 really hearing is the remaining points of disagreement,
20 if we adopt this concept of let's -- let's agree to put
21 off certain depositions for 90 days, it's just a
22 disagreement about which people should go into that
23 category of 90-day people.

24 And he's agreeable as to the ones that are
25 current high-level management people and where I think

1 we have a disagreement is with respect to former
2 high-level managers that he would like to depose within
3 this 90-day period.

4 Is there anything else you want to say about
5 those former 90-day -- former managers he wants to
6 depose and you want put into that post-90-day period and
7 anything else you want to say in response to what he
8 said?

9 MR. FELMLY: Yeah, two things.

10 Ms. Hodder is not actually a former trustee,
11 although she's on a leave of absence. And so she is a
12 current trustee. She is in the group of six. She was
13 one of the six. She is somebody that we believe should
14 be in the group that's deferred.

15 And, in fact, if they're going to add other
16 trustees, I mean, our view is that trustees should be in
17 that group, although Waterbury was new to us today.

18 As to Ryder, the security chief, Colin
19 Callahan, fine.

20 The two young people that are the children of
21 the rector which they mention, those folks raise
22 different issues other than this problem with the
23 criminal investigation. We could notice those
24 depositions, but there will be issues there as to the
25 scope of that, privacy issues, but I don't think it's

1 the same problem we're faced with today in terms of
2 categorization, your Honor. I'm not saying they
3 categorically shouldn't be deposed, but there will be
4 issues and they may or may not be --

5 THE COURT: They're not minors?

6 MR. FELMLY: No, at this point they're
7 probably not.

8 THE COURT: Okay.

9 MR. FELMLY: But they -- they were former
10 students at the school and -- it depends, I suppose, on
11 what the scope of what they want to ask them about, but
12 I'm -- what I'm saying to you is we're not saying they
13 can't be considered for depositions, but I don't want to
14 forget to mention there may well be issues in terms of
15 what the scope of the expected testimony is.

16 And so I guess we're leaving it which is the
17 six people that are in that category as to what -- I've
18 told you what I think about Chad Green and Jada Hebra
19 who are former, but they are recently former and they're
20 right in the middle of this and I think they're key
21 people that should be in this group notwithstanding the
22 fact they're not currently drawing a paycheck.

23 THE COURT: All right. Okay.

24 So let me just -- let me just explain my
25 position. If you have a last word, I'll hear you on it,

1 but --

2 MR. GRYGIEL: I simply had a question to the
3 Court. I wanted to make sure that I understood who the
4 six are.

5 THE COURT: Yeah. Well, I'm not -- I'm going
6 to try to do this without naming names for you. I'm
7 going to try to describe it in a categorical way.

8 So here's my proposed order in this case. My
9 proposed order is that we allow deposition discovery to
10 occur over the next 90 days for any individual that
11 either party wants to depose except for those people who
12 are to be put into the category of not subject to
13 deposition during the first 90 days and whose
14 depositions we will revisit, if necessary, at a
15 subsequent case management conference to be scheduled at
16 some point after the 90-day period.

17 It seems to me that there is ample work for
18 you to do in the next 90 days, most of which can be done
19 by agreement; that includes depositions that the
20 defendant wants to take and depositions that the
21 plaintiff wants to take.

22 So I am sympathetic to the argument and
23 believe it is appropriate to defer the deposition of
24 current management employees who the plaintiff wants to
25 depose, including trustees.

1 To the extent a trustee is on a leave of
2 absence and is not engaged in active management, I don't
3 believe that trustee falls within that particular group.

4 So -- I am not sympathetic to the argument
5 that as to a former employee, whether in senior
6 management or not, that that person's deposition should
7 necessarily be postponed. I understand it'll be
8 difficult and I understand that puts pressure on the
9 defendant to the extent that those depositions will be
10 very important to the outcome of the case, but I believe
11 that that isn't a sufficient reason to justify
12 postponing their deposition, nor do I believe it's a
13 sufficient reason that that person may at some point be
14 called to respond to either an interview or to provide
15 testimony in connection with a criminal investigation.
16 These things happen.

17 If those people are represented by separate
18 counsel and they present a particular concern with the
19 scheduling of their depositions, I think we have to be
20 open to hearing what that concern is and I would expect
21 you as plaintiffs' counsel to make every effort to reach
22 agreement with counsel regarding the scheduling of that
23 deposition.

24 If you cannot and you insist on conducting
25 their deposition within the 90-day period, you can

1 notice it up. And if I get a request from -- for
2 protection from counsel, I will schedule a subsequent
3 hearing and evaluate that request.

4 But I want to urge you to please be sensitive
5 to concerns. It is certainly -- if you put yourself in
6 the position of a former employee who is reading in the
7 newspaper that there is a criminal investigation that
8 may encompass actions that they undertook that that
9 would be a stressful thing, for them to be in that
10 position. And I think we have to be mindful of that and
11 you have to be willing to be somewhat flexible about it.

12 So what I'm putting in the category of defer
13 for 90 days are any senior-level manager that the
14 plaintiff -- that the defendant has identified as
15 someone that they had proposed not to depose, which
16 includes not just employees, but also trustees who are
17 active trustees.

18 As to others, I am not going to defer their
19 deposition and I will leave it to you and Mr. Felmlly to
20 agree on a reasonable schedule as to those people who I
21 have not put in that post-90-day list that allows him to
22 do discovery that he wants to do and you to do discovery
23 that you want to do.

24 In reaching this conclusion, I do find
25 persuasive your argument and I'm going to try to hold

1 you to it; that if you take depositions of senior-level
2 former managers that you give active consideration to
3 whether that eliminates the need to take depositions of
4 others who we wouldn't necessarily want to
5 inconvenience, former students and so forth.

6 I -- I'm assuming you made that statement to
7 me in good faith.

8 MR. GRYGIEL: Yes, your Honor.

9 THE COURT: I can count on you to try to
10 exercise that good faith judgment and limit the number
11 of depositions that need to be taken.

12 So I'm hopeful that by allowing you to do some
13 of these former employee depositions that it may, in
14 fact, lessen the number of depositions that'll have to
15 be taken in the case.

16 So to the extent there's a motion to modify
17 the schedule, I am granting it in part and denying it in
18 part. I'm identifying a stay of -- I'm identifying a
19 group of people by category whose depositions I'm
20 instructing the parties cannot be taken for at least 90
21 days and until further order of the Court.

22 I'm instructing the parties to meet and confer
23 with respect -- about the scheduling of those
24 depositions prior to the expiration of this 90-day
25 period and if the parties cannot reach agreement

1 regarding those remaining depositions that they should
2 request a further status conference with the Court and
3 I'll hear you with respect to specific matters at that
4 time.

5 Mr. Felmly, I instruct you to notify those
6 former employees who have separate counsel that the
7 Court is willing to entertain any concerns that they
8 have. If they have specific needs for protection, they
9 should engage, meet, and confer with the counsel to this
10 case, if they can't reach agreement, they can seek
11 protection from the Court. Okay?

12 MR. FELMLY: I'm assuming in light of this
13 that the trial dates currently on your calendar for
14 March is not --

15 THE COURT: The trial date seems unrealistic
16 to me, given that. I want to move expeditiously. I can
17 assure you that we won't be able to reach the March
18 deadline. We're going to have to reschedule it. But
19 I'm not sure it makes sense to, you know, put on a May
20 deadline or something.

21 MR. FELMLY: We agree.

22 THE COURT: I think it's better to see you in
23 90 days, see where we are, see if we're in a position by
24 agreement to identify a trial date.

25 Is that sensible to people.

1 MR. FELMLY: It's sensible, your Honor.

2 MR. GRYGIEL: Makes sense, your Honor.

3 THE COURT: All right. So the case will be
4 removed from the trial list by agreement and to be
5 rescheduled at a further status conference.

6 And I don't -- I don't want my comments to be
7 mistaken in any way or misconstrued or -- I'm not in any
8 way to convey anything other than the message that I
9 respect counsel in this case, the work that you're
10 doing.

11 I know -- I know people on both sides of the
12 case well and have a high regard for them and I -- and
13 I'm convinced that you can --- have been and will
14 continue to work in a collegial way to revolve these
15 disputes.

16 Sometimes I have to push a little bit to get
17 people to do what I want and I might describe things in
18 stronger terms than I actually intend. I really do have
19 a high regard for the lawyers on both sides of the case
20 and I'm confident that you'll be able to take my general
21 guidance and put it into action.

22 And, you know, I remain willing to meet with
23 you as we move forward. And we will meet again if for
24 no other reason than to pick a trial date. But I'm not
25 intending in any way to be critical of the work that

1 you're doing. This is a difficult case. It raises a
2 lot of challenging problems for lawyers. So I
3 understand and respect that.

4 So is there -- so there was a -- a motion for
5 a conference to modify the scheduling order. I have
6 held the conference. So to that extent you were seeking
7 that relief, I've granted it.

8 To the extent you seek a modification, I've
9 removed the case from the trial list, identified a -- by
10 category certain people whose depositions will not be
11 taken within the next 90 days.

12 I've set a -- did imposed a meet-and-confer
13 duty on you both with respect to depositions of those
14 people.

15 At some point prior to the expiration of the
16 90 day period I've told you that I'll hold another
17 conference with you to discuss the rescheduling of the
18 trial date and to resolve any remaining deposition
19 questions.

20 And I've expressed a willingness to hear from
21 those witnesses who are to be deposed who have counsel
22 about any specific concerns that they may have about the
23 scheduling of their deposition.

24 Is there anything else that I can do for you
25 today?

1 MR. FELMLY: No.

2 MR. GRYGIEL: Nothing your Honor. Thank you.

3 MR. FELMLY: I appreciate your help, your
4 Honor.

5 MR. GRYGIEL: Thank you, your Honor.

6 (Proceedings concluded at 3:05 p.m.)

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C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that
the foregoing transcript is a true and accurate
transcription of the within proceedings, to the best of
my knowledge, skill, ability and belief.

Submitted: 10/3/17

Liza W. Dubois
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